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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

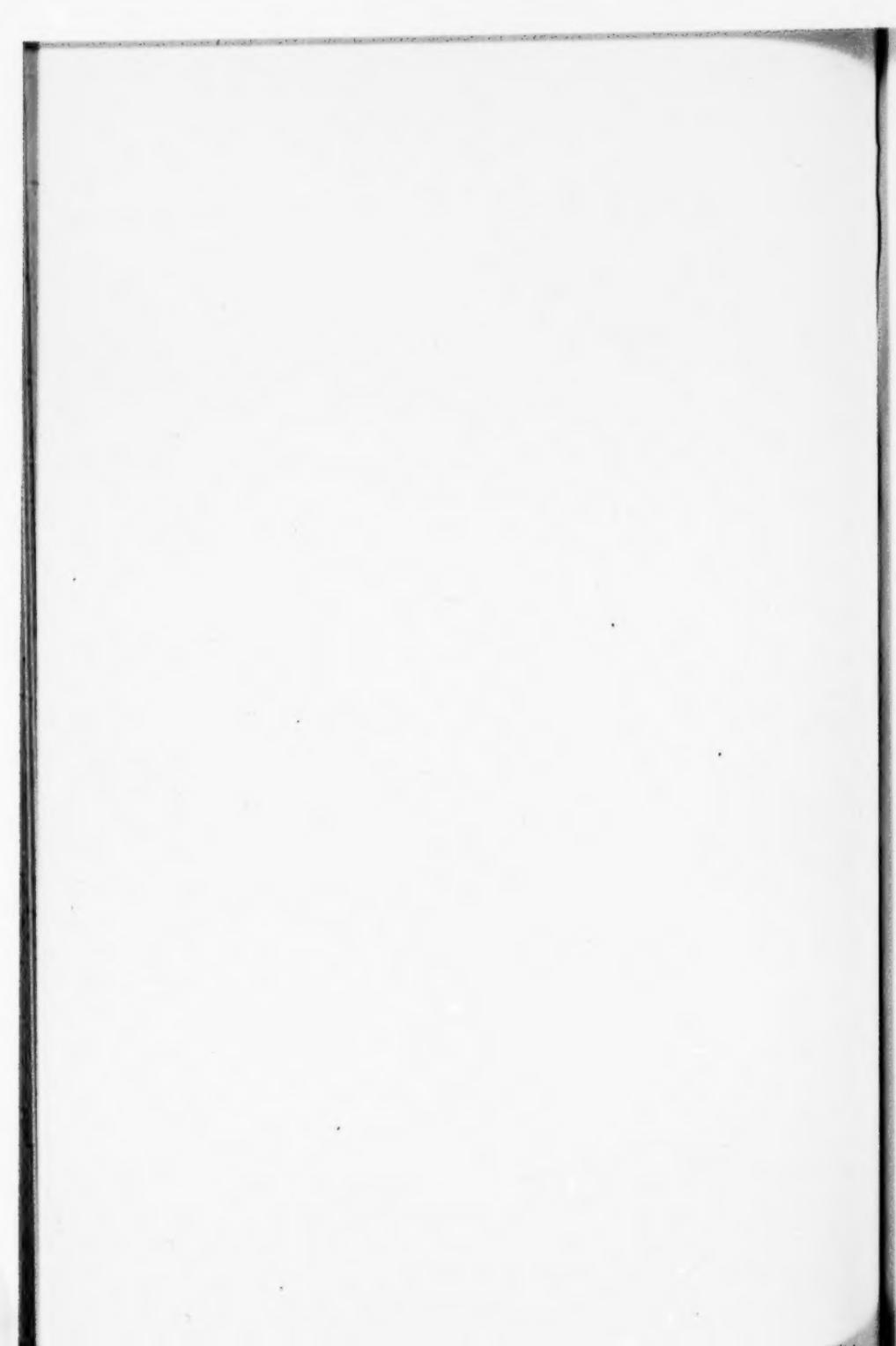
No. **651**

S. DUKE, DOING BUSINESS UNDER THE NAME AND STYLE OF
ROOSEVELT CHAIR & SUPPLY COMPANY,
Petitioner,
vs.

HERBERT A. EVEREST AND HARRY C. JENNINGS,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT
AND BRIEF IN SUPPORT THEREOF.**

CHARLES B. CANNON,
GEO. H. WALLACE,
Attorneys for Petitioner.



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HERBERT A. EVEREST AND HARRY C. JENNINGS,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

INTRODUCTION AND STATEMENT OF MATTER INVOLVED.

Petitioner, S. Duke, doing business under the name and style of Roosevelt Chair & Supply Company, at 1220 South Michigan Avenue, Chicago, Illinois, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit (R. 226 to 232, inclusive) affirming the judgment or so-called "Interlocutory Decree" of the District Court for the Northern District of Illinois, Eastern Division (R. 137, 138, 139) entered February 1, 1943, finding claims 1, 2, 5, 6, 7, 8 and 9 of respondents' patent No. 2,095,411 on a "Folding

Wheel Chair" (R. 156 to 164, inclusive), and claim 11 of respondents' patent No. 2,181,420 on a "Folding Propulsion Wheel Chair" (R. 211 to 218, inclusive), valid and infringed by folding wheel chairs made and sold by the petitioner.

The two patents involved were issued to, and are owned by, the respondents and patentees, Herbert A. Everest and Harry C. Jennings, a copartnership, doing business as Everest and Jennings in the City of Los Angeles, California.

Both patents relate to folding wheel chairs used by invalids and are collapsible sidewise so that they may be stored in a relatively small space when not in use and so that they may be transported in a small space such as the rear seat compartment or trunk of an automobile or the like.

Each of the folding wheel chairs shown in the two patents includes a pair of upright side frames interconnected by an X-brace. The supposed advancement in the art represented by the first and earlier patent No. 2,095,411 resides in the provision of some looseness or "play" at the point of connection between the lower ends of the X-brace and the bottom horizontal side runners of the frame. The supposed advancement in the art represented by the second and later patent No. 2,181,420 resides in the provision of some looseness or "play" at the point of pivoted connection between the arms of the X-brace, rather than at the lower ends of the arms of the X-brace, as in the first patent. This looseness or "play" is supposed to allow the sides of the frames to "rack" so as to maintain both of the front driving wheels of the chair in contact with the ground or other supporting surface, over which the chair is traveling, if one front driving wheel engages an obstruction or depression in the ground, or like sup-

porting surface, so that neither of the two front driving wheels of the chair will lose tractional engagement with the ground or other supporting surface and thus prevent the invalid occupant thereof from propelling the chair.

Jurisdiction.

This is a suit arising under the Patent Laws of the United States, Judicial Code, Section 24(7), 28 U. S. C., Sec. 41.

The jurisdiction of this Court is involved under Section 2490(a) of the Judicial Code as amended by the Act of February 13, 1924 (28 U. S. C., Sec. 347).

The judgment petitioner seeks to have reviewed is dated December 14, 1943, the date of entry of the judgment in the Circuit Court of Appeals, and this petition is, therefore, timely.

The mandate has been stayed by order of the Circuit Court of Appeals to permit the filing of this petition for a writ of certiorari.

Questions Presented.

- (1) Are claims 1, 2, 5, 6, 7, 8 and 9 of Everest and Jennings patent No. 2,095,411 valid and infringed by both forms of the petitioner's folding wheel chairs (the broad claim 1 of this patent being admittedly infringed, if valid)?
- (2) Is the single claim 11 of Everest and Jennings patent No. 2,181,420 in issue valid and infringed by both forms of petitioner's folding wheel chairs?
- (3) Did the Court of Appeals depart from the law established by this Court in the case of *McCarty v. Lehigh Valley Railroad Co.*, 160 U. S. 110, and from the established patent law laid down and followed by the Courts of Appeals of other circuits in holding that the broad claim 1 of

patent No. 2,095,411, even though not limited to a folding *wheel* chair, may, nevertheless, be saved from anticipation and invalidity by reading into the claim the title of the patent, namely, "Folding Wheel Chair" and other elements, including wheels, from the specification and drawings of the patent but which are not recited in the claim itself?

(4) Did the Court of Appeals, in holding claims 2, 5, 8 and 9 of patent No. 2,095,411 valid and infringed by both forms of petitioner's folding wheel chairs (even though petitioner's accused folding wheel chairs entirely lack the aforesaid looseness or "play" called for in these claims and which is supposed to represent the advancement of this patent in the art), depart from established principles governing invention and the rights of patentees and the public as announced by this Court in the cases of

Cuno Engineering Corp. v. Automatic Devices Corp., 314 U. S. 84; and

Atlantic Works v. Brady, 107 U. S. 192; and

(5) Did the Court of Appeals depart from established patent law in holding claims 6 and 7 of patent No. 2,095,411 valid and infringed by petitioner's folding wheel chair (Plaintiffs' Exhibit No. 1) which entirely lacks essential elements of the combination called for in these claims, namely, the small rear caster wheels (76) and the upwardly curved rear frame portions (31) from which these rear easter wheels are swiveled?

(6) Did the Court of Appeals err in interpreting claims 6 and 7 of patent No. 2,095,411 as being valid and infringed by petitioner's folding wheel chair (Defendant's Exhibit "B") even though this chair embodies a construction which is disclosed in the patent as being objectionable and admittedly old in the prior art?

(7) Did the Court of Appeals err in holding the single

claim 11 of patent No. 2,181,420, in issue valid and infringed by both forms of petitioner's accused folding wheel chairs, even though these chairs entirely lack essential elements of the combination of elements called for in this claim; and in treating this claim as though it were a patent upon the supposed single novel element of the claim (the aforesaid looseness or "play" at the point of connection between the arms of the X-brace) rather than as a combination of elements, all of which are essential, and thus give the patentees an unwarranted monopoly by judicial construction of the claim?

(8) Has the Circuit Court of Appeals decided a Federal question in a way probably in conflict with the applicable decisions of this Court so as to call for an exercise of this Court's power of supervision?

Your Petitioner believes that these questions should all be answered in the affirmative; and respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding such Court to certify and send to this Court, on a date to be designated, a full transcript of the Record and all proceedings of the Court of Appeals had in this case; to the end that this case may be reviewed and determined by this Court; that the Judgment of the Court of Appeals be reversed; and that your Petitioner be granted such other and further relief as may seem proper.

Reasons Relied Upon for the Allowance of the Petition.

(1) There is a great and growing demand for folding wheel chairs of the character involved in this controversy, for use by invalid members of the armed forces of the United States as well as for use in government hospitals, and by the public in general. The decision of the Court of Appeals gives the respondents, by judicial construction,

an unwarranted monopoly upon the manufacture, use, renting and sale of modern folding wheel chairs throughout the remaining life of patent No. 2,095,411 (ten years) and of patent No. 2,181,420 (12 years). The effect of this will be that thousands of invalid members of the armed forces of the United States will be compelled to purchase or rent these chairs from the respondents and to pay tribute to the heavy hand of a monopoly never intended by the Patent Statutes to be granted to the respondents upon these patents but awarded by judicial construction.

(2) The Circuit Court of Appeals for the Seventh Circuit by sustaining the two Everest and Jennings patents Nos. 2,095,411 and 2,181,420, here involved, as valid and infringed, has decided a Federal question in a way probably in conflict with the applicable decisions of this Court in the following, among other, cases:

Cuno Engineering Corp. v. Automatic Devices Corp., 314 U. S. 84;

Atlantic Works v. Brady, 107 U. S. 192, 199; and

McCarty v. Lehigh Valley Railroad Co., 160 U. S. 110.

(3) The Circuit Court of Appeals in sustaining all of the aforesaid claims of the two patents, in issue, granted the respondents a monopoly upon forms of folding wheel chairs which they expressly excluded from their own patents (as being admittedly old in the prior art and objectionable) and in so doing the Court ignored the rights of the public under these patents, and hence decided a Federal question in a way probably in conflict with the applicable decisions of this Court in

Schriber-Schroth Co. v. Cleveland Trust Co., 311 U. S. 211;

and in

Exhibit Supply Co. v. Ace Patents Corp., 315 U. S. 126.

(4) The petitioner and respondents are the only manufacturers in the United States of modern folding wheel chairs, of the character here involved, (see Petitioner's affidavit in the Appendix hereto). In view of this fact there is no likelihood of a different decision by any other Court of Appeals, upon either of the patents in issue, and hence for this added reason it is believed that this Court should exercise its power of supervision.

Wherefore your petitioner respectfully prays for the allowance of this petition and the grant of a Writ of Certiorari.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION.

THE OPINIONS OF THE COURTS BELOW.

The Findings of Fact, Conclusions of Law and "Interlocutory Decree" of the District Court (R. 131 to 139, Inclusive) were carefully drawn by counsel for respondents so as to give the respondents, *by judicial construction* of the claims, an unwarranted monopoly upon the modern type of folding wheel chairs with complete disregard of express limitations in the claims. The decision of the Court of Appeals (R. 226 to 237, Inclusive) affirmed the decision of the District Court and further expanded the monopoly granted the respondents by disregarding all of the express limitations in the claims.

ARGUMENT.

POINT I.

The great and growing demand for folding wheel chairs of the type here involved, especially for use by invalid members of the armed forces of the United States, would seem to warrant an immediate review by this Court of the basis of the patent monopoly in question because there is a so great need for such folding wheel chairs that other manufacturers in addition to the respondents should be permitted to supply them. Exceptional circumstances peculiarly affecting the public are sometimes deemed sufficient to warrant the granting of the right to examine the soundness of a decision of a Circuit Court of Appeals even in the absence of conflicting decisions as to the validity of the patent or patents involved. A few instances are

American Fruit Growers, Inc. v. Brogdex Co., 283 U. S. 1.

DeForest Radio Co. v. Gen. Elec. Co., 283 U. S. 664.

Altoona Publix Theatres v. American Tri-Ergon Corp., 294 U. S. 464, 477.

Schriber-Schroth Co. v. Cleveland Trust Co., 311 U. S. 211.

Carbice Corp. v. Am. Patents Corp., 283 U. S. 27.
Leitch Mfg. Co. v. Barber Co., 302 U. S. 458, 461.
Muncie Gear Works v. Outboard, Marine & Mfg. Co., 315 U. S. 759, 62 S. Ct. 865.

Exhibit Supply Co. v Ace Patents Corp., 315 U. S. 126.

United Carbon Co. v. Binney & Smith Co., S. Ct. Law Ed. Advance Opinions, Vol. 87, page 158.

In the *Exhibit Supply Co. case, supra*, the Supreme Court said, at page 128:

"Although there is no conflict of decision, we were moved to grant the petition by the nature of the questions presented, together with a showing that the industry affected by the patent is located in the seventh circuit so that litigation in other circuits resulting in a conflict of decision would not be likely to occur."

A comparable situation exists in this case. Respondents would obviously not risk the possibility of obtaining an adverse decision in another Circuit. If Respondents wished to litigate this patent again they would in all probability bring suit against a dealer or customer in the Seventh Circuit.

The power of this Court to grant a Writ of Certiorari is "coextensive with all possible necessities." *Forsyth v. Hammond*, 166 U. S. 506.

POINT II.

The Circuit Court of Appeals for the Seventh Circuit in upholding the patents in suit has decided a Federal question in a way probably in conflict with the applicable decisions of this Court and more particularly

Cuno Engineering Corp. v. Automatic Devices Corp.,

Exhibit Supply Co. v. Ace Patents Corp.,

Schriber-Schroth Co. v. Cleveland Trust Co., (all *supra*).

The decision of the Court of Appeals in this case is not only in conflict with fundamental principles of Patent Law but operates, and will continue to operate, to the detriment of invalid members of the Armed Forces of the United States, as well as to the detriment of the public at

large. In so upholding the patents in suit the Court of Appeals has misapplied or refused to apply the applicable decisions of this Court. The patents in suit, especially when broadened by judicial decree, as here, are and will continue to be of great importance to the invalid members of the Armed Forces of the United States and to government hospitals and to the public at large.

The decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with the recent decisions of this Court setting forth the standard of what constitutes invention, and the flash of genius held necessary by this Court to constitute invention, as distinguished from mere mechanical skill. Certainly the provision of some looseness or "play" at appropriate points in the frames of the chairs which form the subject matter of the two patents here involved did not require inventive genius. On the contrary, no better example of what constitutes mere mechanical skill, as distinguished from invention, could possibly be given. And yet it is this looseness or "play" at the bottom of the arms of the X-brace, in the first patent, and at the center of the X-brace, in the second patent, which the Court of Appeals has found to represent inventive genius.

This Court in the case of *Cuno Engineering Corp. v. Automatic Devices Corp.*, *supra*, said:

"That is to say the new device, however useful it may be, must reveal the flash of creative genius not merely the skill of the calling. If it fails, it has not established its right to a private grant on the public domain."

Measured by this standard, the respondents, Everest and Jennings, made no invention because all that they did (if anything) was to put some looseness or "play" between relatively movable parts of the frames of the patent chairs, an obvious mechanical expedient, and merely mechanical skill as distinguished from invention.

POINT III.

Neither the title of a patent, nor any part of the disclosure of the specification or drawings, may be read into a claim to save the claim from anticipation and invalidity. The Court of Appeals for the Seventh Circuit, in thus saving claim 1 of patent No. 2,095,411 from anticipation and invalidity, has clearly gone contrary to the law established by this Court and followed by other Circuit Courts of Appeals.

Thus, in the case of *McCarty v. Lehigh Valley Railroad Co.*, 160 U. S. 110, in holding patent No. 339,913 invalid, this Court said:

"There is no suggestion in either of these claims that the ends of the bolster rest upon springs in the side trusses, although they are so described in the specification and exhibited in the drawings. It is suggested, however, that this feature may be read into the claims for the purpose of sustaining the patent. While this may be done with a view of showing the connection in which a device is used, and proving that it is an operative device, we know of no principle of law which would authorize us to read into a claim an element which is not present, for the purpose of making out a case of novelty or infringement. The difficulty is that if we once begin to include elements not mentioned in the claim in order to limit such claim and avoid a defense of anticipation, we should never know where to stop. If, for example, a prior device were produced exhibiting the combination of these claims plus the springs, the patentee might insist upon reading some other element into the claims, such, for instance, as the side frames and all other operative portions of the mechanism constituting the car truck, to prove that the prior device was not an anticipation. It might also require us to read into the fourth claim the flanges and pillars described in the third. This doctrine is too obviously untenable to require argument."

In the case of *Callison v. Pickens*, 77 F. (2) 62, the Court of Appeals for the Tenth Circuit had before it claim 1 of Callison patent No. 1,645,370. The claim was admittedly anticipated unless the words "coin controlled" were read into the claim to limit an element of the claim which called broadly for a "means." In holding the claim invalid the Court said at page 64:

"The question therefore narrows itself to an inquiry as to whether the 'means for lifting the stopping means * * *' is coin controlled and therefore possesses novelty. The claim does not so provide. No reference is made in it to coin control of the stopping means. The specifications are relied upon to aid in sustaining the contention. A patent is enforced according to its claims. The purpose of specifications is to describe the invention so that one skilled in the art may make or use it. It is not the function of specifications to enlarge or contract the claims, but resort may be had to them for the purpose of interpreting the claims; that is, to ascertain the true intent of the parties at the time the claims were made and allowed. * * * We therefore turn to the specifications for aid in interpreting the words 'means' and 'stopping means' as used in the claim.

* * * * *

"Looking to the claim and the specifications to ascertain what appellant had in mind at the time those terms were used in the claim, it is perfectly clear that he referred exclusively to the bar superimposed on the top of the inclined surface which lifts to allow the balls to continue their way to the bottom of the plane and thence to the reloading device. The language used points with compelling persuasion to that conclusion. The claim provides that the balls shall be released 'by lifting the stopping means to release the balls,' manifestly referring to the bar, because nothing else is lifted. That view is reinforced by the fact that each of the other six claims specifically refers to the bar as the stopping means, and we fail to find anything in

the specifications or drawings accompanying them which indicates that the inventor intended to include in the means for stopping the balls anything other than the bar. *Under recognized rules, we cannot super-add coin control for the purpose of limiting the claim to avoid anticipation*, and, without coin control being included as a part of the stopping means, the patent is anticipated by the Young, Caille, MacKenzie, and Ellison patents, all earlier in time, because each of them accomplishes substantially the same thing in substantially the same way."

Other Courts of Appeals have followed this principle of patent law in the following cases:

Frederick R. Stearns & Co. v. Russell, 85 Fed. 218 (C. C. A. 6) (1898).

Penfield v. C. & A. Potts & Co., 126 Fed. 475 (C. C. A. 6) (1903).

General Subconstruction Co. v. Netcher, 174 Fed. 236 (C. C. A. 7) (1909).

Proudfoot Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 230 Fed. 120 (C. C. A. 6) (1915).

Respectfully submitted,

CHARLES B. CANNON,

GEO. H. WALLACE,

(*Attorneys for Petitioner*),

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Chicago 2, Illinois.

(All emphasis added.)





APPENDIX.

**AFFIDAVIT OF PETITIONER IN
SUPPORT OF PETITION.**

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

I, S. DUKE, being duly sworn on oath depose and say: that I am of legal age and a resident of the City of Chicago, County of Cook and State of Illinois; that I am the S. Duke, doing business under the name and style of Roosevelt Chair & Supply Company, 1220 South Michigan Avenue, Chicago, Illinois, the petitioner named in the above identified matter; that until enjoined from so doing by the United States District Court for the Northern District of Illinois, Eastern Division, at Chicago, on or about February 1, 1943, in the matter in which I was defendant and Herbert A. Everest and Harry C. Jennings were plaintiffs, Civil Action No. 4045, I was engaged in the manufacture, sale and renting of folding wheel chairs of the character involved in this litigation and as exemplified by Plaintiffs' Exhibit No. 1 and Defendant's Exhibit B; that the only other manufacturer of folding wheel chairs of the character involved in this litigation, in the United States, or elsewhere, insofar as I am aware, is the partnership, Everest and Jennings, (consisting of Herbert A. Everest and Harry C. Jennings) the plaintiffs in this case; that in my opinion, and based upon my knowledge of and experience in the business of manufacturing, selling and renting such folding wheel chairs, there is no likelihood, or even any possibility, of any further, additional or other suit by the plaintiffs upon either of the patents Nos. 2,095,411 and 2,181,420, here involved, against any other manufacturer of folding wheel chairs, since there is no other manufacturer against whom such an action could be brought; that unless this Court grants the petition for a writ of certiorari herein sought, there will undoubtedly

never be an opportunity for review of the aforesaid plaintiffs' two patents, here involved, by another Court; that folding wheel chairs, of the character exemplified by Plaintiffs' Exhibit No. 1 and Defendant's Exhibit B, and as to which I have been enjoined, are now in great demand, and in the future will be in increasingly greater demand, for private purchase and use by and for wounded and otherwise invalidated members of the armed forces of the United States in and for use in government hospitals, and like places; and that unless this Court grants the petition for a writ of certiorari herein prayed for, and corrects the errors deemed to be present in the decisions of the lower courts upholding the two patents here involved as valid and infringed the plaintiffs will have an unwarranted monopoly, (never intended to be granted by the patent laws), upon the manufacture and sale of folding wheel chairs of the character involved in this litigation during the remaining life of said patents (approximately ten (10) years in the case of patent No. 2,095,411, and twelve (12) years in the case of patent No. 2,181,420), and one result thereof will be that the wounded and otherwise invalidated members of the forces of the United States, and their relatives and friends, will be required to pay excessively and unnecessarily high prices for such folding wheel chairs due to the presence of such a monopoly in the plaintiffs and the absence of competition in the manufacture and sale of such folding wheel chairs.

Further affiant sayeth not.

(Signed) SAM DUKE.

Subscribed and sworn to before me this 12th day of January, A. D. 1944.

(Signed) ROSE E. POLZIN,
Notary Public, Cook County,
Illinois.

(SEAL)



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CHARLES ELMORE GROPLE
OCEAN

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BRIEF FOR RESPONDENTS IN OPPO-
SITION TO PETITION FOR WRIT OF CER-
TIORARI.

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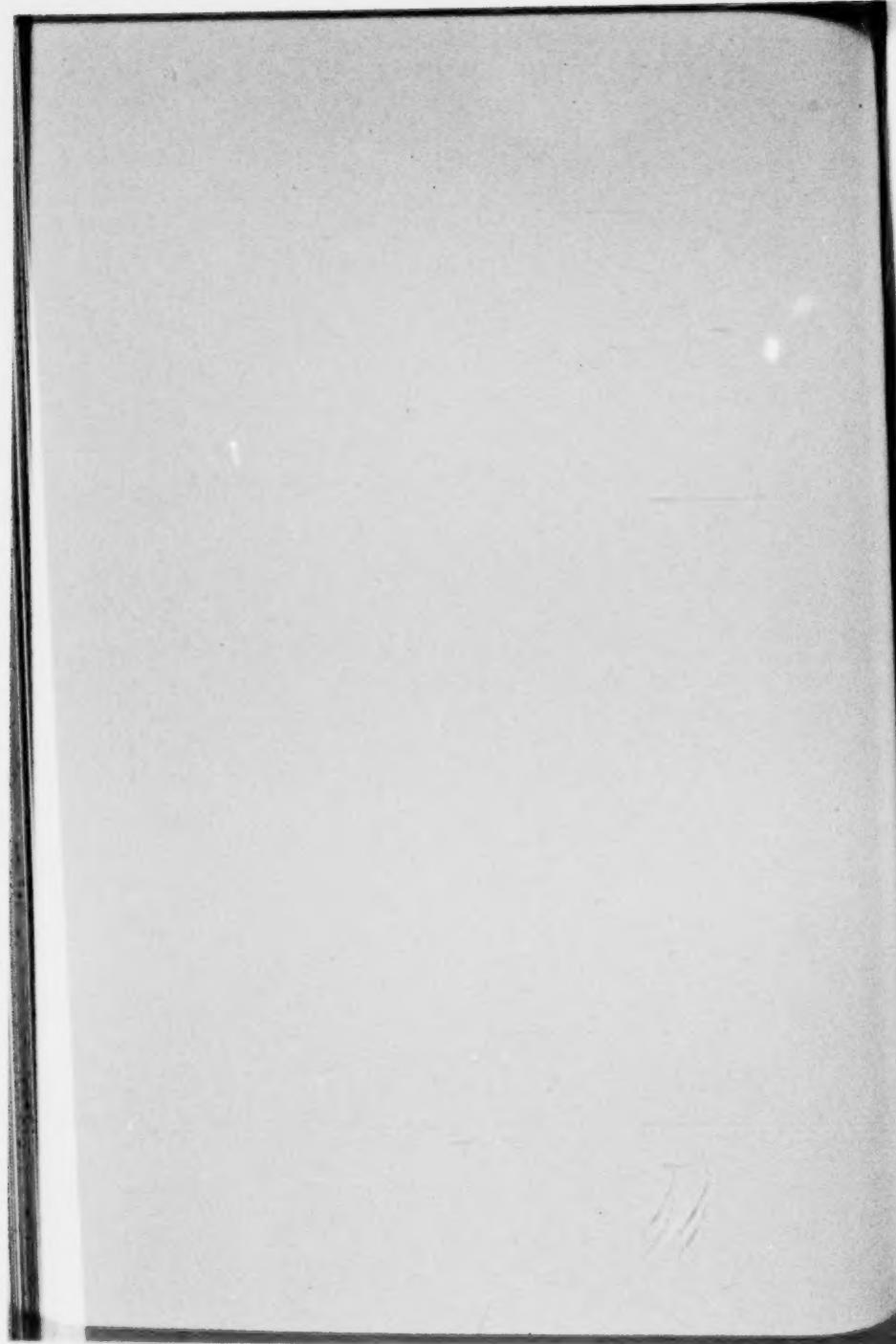


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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

This case is but an ordinary patent infringement suit wherein the defendant (petitioner) Sam Duke, a former distributor of the plaintiffs' patented wheel chairs (R. 59) decided to discontinue doing business

with the plaintiffs and to manufacture and sell wheel chairs embodying plaintiffs' patented inventions himself. For such conduct plaintiffs duly notified defendant of his infringement (R. 70-71) and upon his refusal to discontinue, brought this suit for infringement.

The District Court after hearing and receiving the evidence held that both of plaintiffs' patents No. 2,095,411 and 2,181,420 were valid and infringed as to the claims in issue and entered appropriate findings of fact and conclusions of law (R. 131).

Defendant appealed to the Circuit Court of Appeals in and for the Seventh Circuit, which court after hearing, affirmed the decision of the District Court as to both infringement and validity, (opinion reproduced at R. pp. 226, et seq.).

This petition is filed by petitioner in the hope that This Court will review and disagree with the decisions of the District Court and the Circuit Court of Appeals in and for the Seventh Circuit.

There is no conflict of decision with respect to the plaintiffs' patents between two Circuit Courts of Appeal, nor does the case involve any principle, the settlement of which is of importance to the public.

In *Lagee & Bowler Corp. v. Western Wall Works, Inc.*, 261 U. S. 387; 314 O. G. 177, This Court said:

... . . . It is very important that we be consistent in not granting the Writ of Certiorari

except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal."

In *Keller v. Adams Campbell Co.*, 244 U. S. 314, 327 O. G. 217, This Court said:

"Such an ordinary patent case with the usual issues of invention, breadth of claims and non-infringement, this court will not bring here by certiorari, unless it be necessary to reconcile decisions of the Circuit Courts of Appeal on the same patent."

Again in *General Talking Pictures v. Western Electric Co., Inc.*, 304 U. S. 175, it is said:

"Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." . . .

"Nor would the writ be granted to review the questions of anticipation and invention that petitioner argues, for as to them there is no conflict between decisions of the Circuit Courts of Appeals."

Petitioner urges that an exception be made to the general rule as above announced because:

I. That the patents in suit relate to folding wheel chairs which will probably be used in increasing num-

bers by injured members of the armed forces of the United States;

2. That the lower courts erred in determining that the plaintiffs' patents are valid and have been infringed by the defendant, and

3. That as the defendant is the only present infringer of plaintiffs' patents, there is little likelihood of another case being prosecuted in a different circuit.

None of these reasons justify granting the Writ of Certiorari sought.

Plaintiffs do not pretend to be the originators of invalid wheel chairs. Such chairs were in existence long before plaintiffs made their inventions. The plaintiffs do not have nor do they claim to have any monopoly on invalid wheel chairs. Other chairs which sufficed for the purpose were in existence long before plaintiffs made their inventions. The plaintiffs do not have nor do they claim to have any monopoly on invalid wheel chairs which would inconvenience returning invalid soldiers who may have occasion to use the same. The plaintiffs have developed and patented two meritorious improvements in wheel chairs and are entitled to a just reward therefor as afforded by the patent laws of the United States. The defendant herein, as well as others, can freely manufacture and sell by merely dispensing with the use of plaintiff's patented improvements. Defendant has characterized in his petition these improvements as being mere "looseness or 'play'". To avoid infringement, all the defendant has

to do is to eliminate such "looseness or play." Had the defendant chosen not to incorporate the plaintiffs' inventions in his infringing wheel chair and had he been content to manufacture and sell wheel chairs of other designs, which are not in issue herein, but which are illustrated in his catalog (R. p. 123) this suit would not have been brought nor would the plaintiffs have had a case of infringement.

Petitioner's plea that the effect of the decisions below unjustly gives to the plaintiffs a monopoly which will operate to the detriment of the armed forces of the United States and to the public at large, is not only untrue, but is in derogation of the fact that the defendant himself has filed an application for a patent on a wheel chair apparently identical with the patents in suit (R. pp. 72-77). Furthermore, the defendant herein claims to have acquired title to the Hayes patent, No. 1,898,834 reproduced in the record at p. 198 and has charged the plaintiffs with infringement of the Hayes patent by reason of plaintiffs having manufactured and sold wheel chairs embodying the inventions of the patents in suit. See the letter reproduced herein in the appendix hereto. We do not feel that it is proper for the defendant to petition this court for a writ of certiorari based on an allegation that the plaintiffs have secured a patent monopoly on folding wheel chairs that invalid soldiers might use, when the defendant himself is endeavoring to acquire and assert a similar monopoly.

In so far as the petition seeks a Writ of Certiorari, on the ground that plaintiffs' patents lack invention, the writ should be denied. This Court has already determined that it will not grant Certiorari merely "to review the questions of anticipation and invention" (*General Talking Pictures v. Western Electric Co., Inc.*, *supra*). In the absence of conflict between Circuit Courts of Appeals, the lower courts here must be presumed to have properly applied the law and the standards of invention heretofore indicated by This Court's decisions, to the facts touching upon these questions as presented before them herein.

Nor is the defendant correct in asserting that the Circuit Court of Appeals acted in conflict with *McCarthy v. Lehigh Valley R. R. Co.*, 160 U. S. 110. The Circuit Court of Appeals herein has not read into claim 1 of Patent No. 2,091,411, any elements or limitations to save it from anticipation. On the contrary as stated by the Circuit Court of Appeals (R. 228):

"It is true that claim 1 merely recites a folding chair but for reasons heretofore stated *that fact does not render the cited art any more pertinent.*" (Italics added.)

Consequently this claim was not anticipated, regardless of whether it claimed "A folding chair . . .," as stated, or "A folding propulsion wheel chair . . .," which might have been better.

The holding of the Circuit Court of Appeals, instead of being inconsistent, is thus in harmony with

that portion of *McCarthy v. Lehigh Valley R. R. Co.* reading ". . . this may be done with the view of showing the connection in which a device is used and proving it is an operative device. . . ." (Italics added.)

The Circuit Court of Appeals was therefore justified in construing the claim as being drawn to a folding wheel chair in view of the title, the disclosure and the drawings.

Finally, petitioner seeks a Writ of Certiorari on the ground that there is little likelihood of a conflict of decision between Circuit Courts of Appeal, because, except for plaintiffs, petitioner is "the only other manufacturer of folding wheel chairs of the character involved in this litigation in the United States or elsewhere."¹ (Petitioner's affidavit in appendix to petition.) The answer to this contention is that the plaintiffs and defendant are not the only manufacturers of wheel chairs. Neither manufacture nor infringement are exclusively in the Seventh Circuit.² Plaintiffs have heretofore brought suit against a Mr. McDonald at San Diego, California (R. 68) and will hereafter institute suit for infringement of their patents whenever or wherever occasion requires.

Manufacture of wheel chairs is not confined to the Seventh Circuit as in the case of *Exhibit Supply Co. v. Ace Patents Corporation*, 315 U. S. 126. Plaintiffs,

¹—It would almost necessarily follow that this case presents no question "the settlement of which is of importance to the public as distinguished from that of the parties." At least no such question is pointed out in the petition.

themselves, manufacture and sell in Los Angeles, California. Aside from McDonald in San Diego, California and this defendant in Chicago, Illinois, plaintiffs' patents have generally been respected throughout the United States and there has been no other infringement to plaintiffs' knowledge. Consequently there has been no occasion to sue, in any other than the Seventh and Ninth Circuits. In the absence of a showing that manufacture of invalid wheel chairs is largely confined to the Seventh Circuit, this ground for petitioning for Writ of Certiorari is untenable.

It is therefore submitted that both the District Court and the Circuit Court of Appeals have properly decided this litigation and that no recognized ground for granting a Writ of Certiorari exists. The petition should therefore be denied.

Respectfully submitted,

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WALLACE AND CANNON

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PATENTS AND TRADE MARKS

ONE NORTH LA SALLE STREET

CHICAGO 2

GEO. H. WALLACE
CHARLES B. CANNON
FRED BING

WALLACE AND CANNON
1937-1940

TELEPHONE
CENTRAL 5575-6
CABLE ADDRESS
WALCAN, CHICAGO

Thursday
December 30, 1943.

Everest and Jennings
1032 W. Ogden Drive
Los Angeles, California

Gentlemen:

Our client, Mr. Sam Duke, doing business as Roosevelt Chair & Supply Company, at 1220 South Michigan Avenue, Chicago, Illinois, is the owner of the entire right, title and interest in and to United States patent No. 1,898,834 granted February 21, 1933, on Chairs, in the name of Thomas R. Hayes, together with all rights to recover for past infringement thereof.

Our attention has been called to the fact that you are manufacturing and selling folding wheel chairs, as exemplified by your so-called "Traveler" and "Universal" models which, in our judgment, infringe claim 4 of this patent.

Accordingly, in behalf of our client, we are authorized to and do hereby notify you as to claim 4 of the above identified patent and call upon you to discontinue the manufacture and sale of the above identified or other folding wheel chairs deemed to infringe said claim and to account to our client for all profits and/or damages resulting from the manufacture, sale and use of such infringing folding wheel chairs.

Yours very truly,

WALLACE AND CANNON

Charles B. Cannon
By Charles B. Cannon.

CBC:ID
cc
Reg. Ret. Recept.